# INDEX


| | Page |
|---|---|
| Statement | 2 |
| Argument | 7 |
| Conclusion | 16 |


## CITATIONS


Cases:

*Alleghany Corp.* v. *Kirby*, 344 F. 2d 571, certiorari dismissed, *sub nom. Holt* v. *Alleghany Corp.*, 384 U.S. 28 ..... 8

*Associated Press* v. *United States*, 326 U.S. 1 ..... 15

*Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 ..... 9

*Silver* v. *New York Stock Exchange*, 373 U.S. 341 ..... 15

*Sutphen Estates* v. *United States*, 342 U.S. 19 ..... 12

*Swift and Co.* v. *United States*, 276 U.S. 311 ..... 11

*Tesseyman* v. *Fisher*, 231 F. 2d 583 ..... 8

*United States* v. *Borden Co.*, 347 U.S. 514 ..... 10

*United States* v. *Grinnell Corp.*, 384 U.S. 563 ..... 13

*United States* v. *Radio Corporation of America*, 186 F. Supp. 776, appeal dismissed, 364 U.S. 518 ..... 12

Statutes and rules:

Sherman Act, Sections 1 and 2, 15 U.S.C. 1, 2 ..... 2, 15

F.R. Civ. P. 24(a) ..... 6, 7, 10, 11

F.R. Civ. P. 24(b) ..... 6, 11, 12

Miscellaneous:

2 Barron & Holtzoff, *Federal Practice and Procedure*, ¶ 594 (1961) ..... 8

4 *Moore's Federal Practice*, 24.10(4) (1966) ..... 12




286-163—68

# In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 820

THRIFTY SHOPPERS SCRIP CO., APPELLANT

*v.*

UNITED STATES OF AMERICA, BLUE CHIP STAMP COMPANY, ET AL.

No. 849

WILLIAM TWYMAN, ET AL., APPELLANTS

*v.*

UNITED STATES OF AMERICA, BLUE CHIP STAMP COMPANY, ET AL.

*ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA*

## MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States moves that the judgment of the district court be affirmed.

## STATEMENT

These are direct appeals from orders of the district court (J.S. App. B)[1] denying appellants' motions to intervene in the proceedings below and to vacate a final judgment entered by consent on June 5, 1967. The consent judgment was entered in an antitrust action brought by the United States against the Blue Chip Stamp Company ("Blue Chip") and its stockholders (a group of retail stores).

1. *The government's suit.*

Blue Chip was organized in California in 1956 for the purpose of selling and redeeming trading stamps. Its incorporators and principal shareholders were retail merchants who would distribute the stamps to their customers (R. 93).

In December 1963, the United States filed a complaint in the United States District Court for the Central District of California, alleging that Blue Chip and its retailer-owners had attempted to monopolize and had monopolized the trading stamp business in California, in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2. The complaint charged that the defendants had entered into exclusive dealing arrangements, had boycotted other retailers and had fixed prices, and thereby had obtained a monopoly of the trading stamp business in California. The government sought divestiture by each of the defendant retailers of its stock ownership in Blue Chip and an injunction against their controlling the company

[1] Appendices A, B, and C, of the respective jurisdictional statements, are identical.

and regulating the rate of issuance of Blue Chip stamps (R. 14).

2. *The consent decrees*

Extended negotiations between the parties led to the successive filing with the court of three proposed consent decrees, the last of which the court entered. The government followed its customary practice of providing that, to give interested parties an opportunity to be heard, the decree could not be entered for 30 days, during which the government might withdraw its consent (J.S. App. 2-3).

The first decree, filed on July 22, 1966, was not consented to by two of the defendants. Objections thereto were filed by those two defendants and by the State of California and two trade associations of grocers. As a result, the government withdrew its consent (J.S. App. 3).

On October 28, 1966, a second decree, to which the same two defendants again did not consent, was lodged with the court. The same persons who had objected to the prior decree and a trading stamp company opposed this one, and after hearing the district court stated that it would not sign the decree. The court indicated certain provisions it regarded as essential to an acceptable decree (J.S. App. 3).

On April 28, 1967, a third decree, which incorporated the provisions the district court deemed essential, was filed. All the defendants consented to this decree and the previous objectors (other than the trading stamp company) deemed it satisfactory. The present appellants (as well as two trading stamp com-

parties) filed briefs *amicus curiae* opposing the decree. After a hearing at which the objectors were heard, the district court on June 5, 1967 approved and entered the decree (J.S. App. C). (J.S. App. 3–4.)

The decree enjoins the retailer defendants from combining or conspiring to restrain or from monopolizing or attempting to monopolize the trading stamp business in California (J.S. App. 25). It specifically prohibits agreements among users of stamps which prevent the use of any particular trading stamp service or which limit the rate of issuance of trading stamps by the retailer to his customers (J.S. App. 26). Blue Chip is directed within 60 days to submit for court approval a reorganization plan under which the defendants will retain 45 percent of the stock of the new company; another 45 percent will be offered to the public (nearly all of which is first to be made available to users of Blue Chip stamps other than the defendants, in proportion to their use); and 10 percent will be reserved for the management of the new company (J.S. App. 26–27; 40–44). The shares in the reorganized company to be retained by the retailer defendants cannot be voted by them, but only by an independent third person; and such defendants are barred, for 10 years, from acquiring any additional shares in the company and from acting as officers or directors thereof (J.S. App. 32). Blue Chip and its successor company are enjoined from refusing to provide trading stamp service, or limiting such service, because of (1) the presence in the same locality of a competing stamp service, (2) the rate of issue of

stamps by the user to his customers or (3) the user's employment of any other stamp service (J.S. 31). If Blue Chip is not thus reorganized, the judgment requires it, within 15 months of such failure of reorganization, to divest all of its assets and good will and to dissolve (J.S. App. 27–28). Within 30 months of reorganization, the new company is required to submit a plan under which it will offer to sell one-third of its then existing business in the State of California (J.S. App. 32–34).[2]

3. *The Motions to Intervene*

Appellant in No. 820, Thrifty Shoppers Scrip Company ("Thrifty"), is engaged in the trading stamp business in California. On April 25, 1967—three days before the third consent decree was filed with the court—it instituted a private antitrust action against Blue Chip and its retailer-shareholders, charging the identical violation alleged in the government's complaint. Its complaint seeks divestiture by the retailers of all their stock in Blue Chip, and an injunction against their use of Blue Chip trading stamps. As noted, Thrifty participated *amicus* in opposing the decree. On July 12, 1967, 37 days after the district

[2] The prospective purchaser of such business must be approved by the court, and the business to be sold must be located in a contiguous area of Southern California. The new company is to be prohibited for one year from selling its stamps in competition with the purchaser in that area, but thereafter will be required to compete there with the purchaser. The purchaser will be bound by the injunctive provisions in the decree directed against Blue Chip and its successor (J.S. App. 33–34).

court entered it, Thrifty filed a motion to intervene, and for vacation of the decree (J.S. App. 4; R. 2739).

Appellants in No. 849 are 1,775 independent California service station operators, who have instituted a similar private treble-damage action against Blue Chip and defendant retailers. They also participated *amicus* in opposition to the consent decree. On June 15, 1967, ten days after the court entered the decree, they moved to intervene and to vacate the judgment (J.S. App. 4–5; R. 2694, 2697).

After hearing, the district court denied the motions (J.S. App. B; R. 3065).[1] Noting that neither motion was timely, the court ruled that the appellants had not shown any unusual circumstances warranting the granting of untimely motions (J.S. App. A, pp. 6–12). The court further held that, in any event, the appellants had not shown that they had an "interest relating to the property or transaction which is the subject of the action" that would justify intervention as of right under Rule 24(a) of the Federal Rules of Civil Procedure (J.S. App. A, pp. 12–13). The court also denied permissive intervention under Rule 24(b) (J.S. App. 14–16). Finally, the court ruled that appellants' request to vacate the consent judgment had "no merit" (J.S. App. 16). It stated (*ibid.*) that appellants "do nothing more than reiterate arguments previously presented; they fail to raise any additional arguments not already heard at length and denied by this Court."

[1] The Court also denied motions to intervene and vacate by Raley's, Inc., a nondefendant stockholder of Blue Chip. Raley's has not pursued its appeal to this Court. (Stipulation and Order Dismissing Appeal dated November 13, 1967.)

## ARGUMENT

This appeal presents no substantial question warranting plenary consideration by this Court. The district court correctly denied intervention as of right, did not abuse its discretion in denying permissive intervention, and properly refused to vacate the consent judgment.

1. Rule 24(a)(2) of the Federal Rules of Civil Procedure provides that "[u]pon timely application" intervention shall be allowed

> when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The appellants did not satisfy two of these requirements for intervention as of right: (a) their applications to intervene were not timely; (b) the disposition of the government antitrust suit through the consent judgment did not "as a practical matter impair or impede" their "ability to protect" their interest in the subject matter of that suit.

(a) Although the appellants were fully aware of the terms of the third proposed consent judgment and actively opposed it as *amici curiae* in briefs and oral argument, they waited until 37 and 10 days, respectively, after the district court had entered the judgment before moving to intervene. The general rule is that intervention sought after judgment is untimely

unless a strong showing is made that such belated participation is necessary to protect a right that otherwise could not be safeguarded. 2 Barron & Holtzoff, *Federal Practice and Procedure*, ¶ 594 (1961). Appellants made no such showing here. They had ample opportunity to seek intervention during the 38 days that the proposed consent decree was on file with the court; instead, they elected to present their opposition thereto through participation as *amici*. Moreover, appellants were aware that since all the parties to the case had agreed to the judgment, there would be no one to appeal if the court entered it; yet they chose not to seek timely intervention to protect their own right to appeal.

The determination whether a particular application to intervene is timely rests primarily within the discretion of the district court. *Tesseyman* v. *Fisher*, 231 F. 2d 583 (C.A. 9); *Alleghany Corp.* v. *Kirby*, 344 F. 2d 571 (C.A. 2), certiorari dismissed *sub. nom. Holt* v. *Alleghany Corp.*, 384 U.S. 28. Appellants have not shown that the district court abused its discretion in viewing their applications to intervene as untimely—particularly so since the purpose of the intervention was to vacate the judgment and, as the court pointed out (J.S. App. 16), the appellants did "nothing more than reiterate arguments previously presented; they

fail[ed] to raise any additional arguments not already heard at length and denied by this Court."[4]

(b) Appellants also failed to show that the consent judgment that terminated the government antitrust case "as a practical matter impair[ed] or impede[d]" their "ability to protect" their interest in the subject matter of that suit. The interest they sought to protect by intervention was the successful prosecution of private antitrust suits they had filed charging the defendants in the government case with the same violations. Since the consent judgment expressly states that it was entered "without trial or adjudication of any issue of fact or law herein" (J.S. App. 23–24), it neither determined whether any of the defendants had violated the antitrust laws nor decided what relief would be appropriate if such violations were found. If the appellants in their suits can establish (1) that the defendants have committed the violations charged and (2) that relief either broader or different than that provided by the consent judgment is necessary and appropriate to vindicate appellants' rights, then

[4] Appellants' reliance (J.S. No. 820, p. 20; J.S. No. 849, pp. 11, 25–27) upon *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129, to support their claim that they timely sought intervention, is misplaced. All three of the applications for intervention which this Court there held had been improperly denied were filed *before* the district court entered its decree. The decree was entered on June 24, 1965 (Record on appeal, Nos. 4, 5, and 24, 1966 Term, p. 2172). The applications to intervene were filed on July 22, 1964 (*id.* p. 68), October 7, 1964 (*id.* p. 69) and June 22, 1965 (*id.* p. 2078).

they are entitled to such relief. Were the district court to refuse it, such ruling could be reversed on appeal.

Thus, the fact that appellant Thrifty's complaint seeks the same relief that the government sought—relief that the consent judgment does not fully provide (see *infra*, pp. 13–16)—will not as a practical matter preclude Thrifty from obtaining such relief if it can demonstrate the need therefore. "These private and public actions were designed to be cumulative, not mutually exclusive" (*United States* v. *Borden Co.*, 347 U.S. 514, 518). The fact that a consent judgment in a government antitrust suit provides lesser or different relief than that sought in a private suit based upon the same alleged violations does not entitle the private plaintiff to intervene as of right in the government suit to oppose the consent judgment. For if it did, the large number of private suits that ofen follow the initiation of a government suit would mean that there would be a substantial amount of intervention by such private plaintiffs in government antitrust litigation. This, in turn, would frequently make it virtually impossible for the original parties to the government suit to settle the case on terms that the government believes would better serve the public interest than bringing the case to trial.

Nor can appellants predicate any right to intervention on the claim that such participation was necessary to protect the public interest. It is doubtful that the "interest relating to the property or transaction which is the subject of the action" that Rule 24(a)(2) is designed to protect through intervention,

covers a general public interest in the proper enforcement of the laws. On the contrary, it appears to refer to the intervenor's private or property interest.

In any event, any such interest on the part of the appellants has been "adequately represented by existing parties" (Rule 24(a)(2)), namely, by the Attorney General. For the Attorney General has the duty to enforce the antitrust laws by bringing suits to restrain violations of such laws, and his enforcement authority includes the right to settle such suits on terms he deems appropriate. Cf. *Swift and Co.* v. *United States*, 276 U.S. 311, 331–332. In the present case, through his representatives in the Department of Justice, he conducted negotiations for a consent judgment for more than two years; three different decrees were filed with the court; and the decree ultimately entered met the objections of the State of California and the two trade associations that had opposed the earlier proposals (R. 2547, 2593). The government was fully justified, in working out the final decree with the parties, to give effect to the stated views of the district judge as to the changes he deemed necessary before he would approve any consent judgment; indeed, its failure to do so would have subjected it to valid criticism.

2. Rule 24(b) provides that upon timely application, permissive intervention may be granted

> when an applicant's claim or defense and the main action have a question of law or fact in common. * * * In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

The district court did not abuse its discretion in denying permissive intervention. *First*, the untimeliness of the applications to intervene, which supports the denial of intervention as of right (see *supra*, pp. 7-8), equally justifies the denial of permissive intervention. *Second*, since appellants have an entirely adequate remedy in their pending private antitrust suits (*supra*, pp. 9-10), there was no occasion to permit them belatedly to intervene in this case. *Third*, appellants raised no new points, but merely reiterated the arguments they previously had made in their *amici* submissions, and which the court had considered and rejected (J.S. App. 16). *Fourth*, permitting intervention would have "delay[ed] or prejudice[d] the adjudication of the rights of the original parties," contrary to the intendment of Rule 24(b), by (1) postponing implementation of the consent decree, (2) perpetuating the restraints the decree is designed to correct, and (3) possibly forcing the parties to bear the burden and expense of a long and difficult trial they do not want. See *United States* v. *Radio Corporation of America*, 186 F. Supp. 776, 777 (E.D. Pa.), appeal dismissed, 364 U.S. 518. Permissive intervention was properly denied. Cf. *Sutphen Estates* v. *United States*, 342 U.S. 19, 23; 4 *Moore's Federal Practice*, 24.10(4) at 62 (1966 ed.).

3. Finally, there is no merit to appellants' contention (J.S. No. 820, pp. 17, 21-27; J.S. No. 849, pp. 16-25) that the consent judgment provides inadequate relief. The district court therefore properly denied appellants' motions to vacate that judgment—

motions which rested on the same grounds upon which they here challenge the judgment.

Appellants' basic contention is that, because the judgment neither dissolves Blue Chip nor requires complete divestiture of the retailer-stockholders' stock interest in the company, it does not satisfy the standard announced in *United States* v. *Grinnell Corp.*, 384 U.S. 563, 577, that "adequate relief in a monopolization case should put an end to the combination and deprive the defendants of any of the benefits of the illegal conduct, and break up or render impotent the monopoly power found to be in violation of the Act." But this standard does not automatically call for dissolution in every monopolization case. That is particularly so where, as here, there has been no trial and no adjudication of violation and, at the same time, there has been ample exploration of the impact of various forms of relief on the affected persons. The consent judgment in this case will effectively dissipate the defendants' monopoly power, while at the same time retaining certain beneficial effects of Blue Chip's operations and protecting the interests of small retailers who might be seriously injured if Blue Chip were completely dissolved.

(a) Blue Chip basically is a joint venture of many retailers of varying size, which achieved monopoly power as a result of the restrictive conditions it imposed on its members which effectively precluded other trading stamp companies from entering the market (see *supra*, p. 2). The decree specifically prohibits these restrictive practices and insures all re-

tailers both access to Blue Chip stamps and the right to acquire stock in the company (see *supra*, pp. 4–5). Once those steps have been accomplished, the large share of the market embraced by the Blue Chip cooperative trading stamp program has a far less significant anticompetitive effect.

Moreover, the decree is adequate to insure competing trading stamp companies an adequate opportunity to enter the California market or to regain market shares they had lost to Blue Chip as a result of the latter's anticompetitive practices. The decree not only will reduce the size of Blue Chip by one third in about two and one-half years, but also enjoins any arrangement under which Blue Chip licensees deal exclusively in Blue Chip stamps. It also creates an opportunity for a new stamp company to enter the market by acquiring part of Blue Chip's business.

Appellants argue (J.S. No. 820, pp. 25–26; J.S. No. 849, pp. 22, 24) that the wide ownership of Blue Chip stock that will result from the decree will ensure that most California retailers will continue to use Blue Chip stamps. This contention is wholly speculative and seems unrealistic in the light of the facts in the record. The effect that a particular retailer's use of Blue Chip stamps is likely to have upon Blue Chip's profits and dividends is so miniscule that it is most unlikely that a retailer's stock ownership in the company would induce it to continue to use Blue Chip stamps if it thought that another kind or brand of stamp was cheaper or better, or that it would be preferable to avoid the expense of stamps altogether. Indeed, four of the grocery chains

that own stock in Blue Chip have dropped its stamps in favor of some other brand or none at all (R. 3007).

(b) Even in litigated antitrust cases where the defendants possess monopoly power but the principal thrust of the complaint is against the restrictive practices by which such power was acquired or maintained, it is not unusual if the combination accomplishes some socially desirable ends, for the judgment to correct the violation by prohibiting the restrictive practices rather than breaking-up the combination. *E.g., Associated Press* v. *United States*, 326 U.S. 1; *Silver* v. *New York Stock Exchange*, 373 U.S. 341.[3] Blue Chip provides important service to smaller retailers so long as it offers its stamps on a non-exclusive basis, because most independent trading stamp companies will make their stamps available only under exclusive franchises in given marketing areas (Tr. 168–169). This necessarily limits the access of smaller retailers to trading stamp programs, and may place them at a serious disadvantage as against their franchised competitors.

The government consented to this decree only because it was satisfied that it would adequately dissipate the primary anticompetitive effects of the monopolistic scheme. Once the court was similarly persuaded, it was proper for it to consider the interests of those small retailers who might continue to use Blue Chip stamps and who would suffer grievous harm if the company were so dismembered that the stamps themselves lost their attractiveness.

[3] Although those cases involved violations of Section 1 rather than Section 2, this fact does not vitiate the analysis in the text.

In the context of a complex case involving many conflicting considerations, the district court adopted a decree which we believe effectively dissipates the major evils of the original scheme without sacrificing certain beneficial aspects of the program and without prejudicing the interests of many small retailers whose involvement in the original illegal aspects of the scheme was at most peripheral.

## CONCLUSION

The orders of the district court denying appellants' motions to intervene and motions to vacate should be affirmed.

Respectfully submitted.

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